(1)
Supreme Court, U.S
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In The

Supreme Court of the United States

TERRIE HUTTON,

Petitioner,

vs.

LAW OFFICES OF HERBERT HAFIF, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Second Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

To combat an alarming increase of lawsuits filed primarily to chill citizens' exercise of their constitutional rights of freedom of speech and petition to redress grievances, known as Strategic Lawsuits Against Public Participation or "SLAPPs," the California Legislature passed Anti-SLAPP legislation.

In the present action, a group of attorneys, attempting to dissuade a former client and others from complaining to the California State Bar about their unethical conduct, filed a SLAPP suit. After successfully defeating this SLAPP, the former client filed an action against the attorneys for the damages sustained as a result of the attorneys' SLAPP suit. The California Court of Appeal ordered the trial court to dismiss the former client's malicious prosecution lawsuit under California's Anti-SLAPP legislation, even though the underlying lawsuit by the attorneys was itself a SLAPP suit.

This petition for writ of certiorari presents the following questions:

1. Does an order directing the summary dismissal of a malicious prosecution action under an Anti-SLAPP statute, when the underlying action was itself a SLAPP suit, violate the First Amendment guarantees of the right to petition and access to the courts?

2. Is a litigant's substantive due process right violated when an otherwise valid lawsuit, seeking damages resulting from the defendants' previous malicious institution of a SLAPP suit,

QUESTIONS PRESENTED FOR REVIEW – Continued

is summarily dismissed under an Anti-SLAPP statute, since no rational basis exists for applying the Anti-SLAPP statute in a manner that is antithetical to the stated purpose of the legislation?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

TERRIE HUTTON is the Petitioner to this Petition, Respondent in the California Court of Appeal action (B162572) and Plaintiff in the California state court action (BC241082).

LAW OFFICES OF HERBERT HAFIF, HERBERT HAFIF, CYNTHIA D. HAFIF AND GREGORY K. HAFIF (sometimes referred to as the "Hafif defendants") are the Respondents to this Petition, Appellants in the California Court of Appeal action (B162572) and Defendants in the California state court action (BC241082).

WYLIE A. AITKEN, DARREN O. AITKEN and LAW OFFICES OF WYLIE A. AITKEN are not parties to this Petition or the California Court of Appeal action, but are defendants in the California state court action (BC241082).

RONALD C. STOCK is not a party to this Petition or the California Court of Appeal action, but is a defendant in the California state court action (BC241082).

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Order re Hafif Defendants Motion for Correction of Clerical Error, filed October 10, 2002 in *Terrie Hutton v. Herbert Hafif, et al.*, Los Angeles County Superior Court Case No. BC241082, affirming the trial court's denial of the Hafif defendants' Anti-SLAPP motion, which was reversed by the California Court of Appeal on May 11, 2004. App. 13-15.

Denial of Petition for Review by Supreme Court of California, filed July 28, 2004 in *Terrie Hutton v. Herbert Hafif, et al.*, Case No. S125728. App. 16.

JURISDICTION

On October 10, 2002, the California Superior Court for the County of Los Angeles entered an order denying the Hafif defendants' motion to summarily dismiss Mrs. Hutton's complaint under California's Anti-SLAPP statute. On May 11, 2004, the California Court of Appeal reversed, and ordered that Mrs. Hutton's complaint be summarily dismissed under California's Anti-SLAPP statute. On June 2, 2004, the California Court of Appeal denied Mrs. Hutton's petition for rehearing. On July 28, 2004, the California Supreme Court denied Mrs. Hutton's petition for review.

On October 14, 2004, an application to extend the time to file this petition was submitted to Justice O'Connor. That application was granted on October 19,

2004, bearing reference number 04A302, providing an extension to file this petition to November 25, 2004.

The questions presented by this petition for writ of certiorari are within this Court's jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V provides, in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code Section 6094(a) provides:

> Communications to the disciplinary agency relating to lawyer misconduct or disability or competence, or any communication related to an investigation or proceeding and testimony given in the proceeding are privileged, and no lawsuit predicated thereon may be instituted against any person. The disciplinary agency and officers and employees are subject to the rules governing liability of public entities, officers, and employees specified in Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.
>
> Nothing in this subdivision limits or alters the privileges accorded communications to the State Bar or testimony given in investigations or proceedings conducted by it or the immunities accorded complainants, informants, witnesses, the State Bar, its officers, and employees as existed prior to the enactment of this section. This subdivision does not constitute a change in, but is cumulative with the existing law.

California Code of Civil Procedure Section 425.16 provides:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation

should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of

California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, 'complaint' includes 'cross-complaint' and 'petition,' 'plaintiff' includes 'cross-complainant' and 'petitioner,' and 'defendant' includes 'cross-defendant' and 'respondent.'

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

California Code of Civil Procedure Section 425.17(a) provides:

The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and

intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

STATEMENT OF THE CASE

This case arose when an attorney, upset that his client had filed a complaint with the California State Bar, sued the client on five causes of action for in excess of 50 million dollars. The filing and prosecution of this suit was a direct violation of California Business and Professions Code Section 6094(a). After six years, the attorney's lawsuit was finally terminated by way of the client's Anti-SLAPP motion and affirmance on appeal. However, when the client sought redress, the SLAPPing attorney invoked the Anti-SLAPP statute to deprive his client, Mrs. Hutton, of her right to petition for redress of grievances and to protect his filing of the SLAPP against his client.

This Petition seeks review of the May 11, 2004 opinion and order from the California Court of Appeal for the Second Appellate District. Petitioner raised the issues presented in this Petition below.

Prior to the issuance of the May 11, 2004 opinion, Petitioner Mrs. Hutton, the Respondent below, caused to be filed a Respondent's Brief and to have the Court of Appeal take Judicial Notice of a Second Supplemental Brief filed in a companion case.

These briefs argued that application of the Anti-SLAPP statute in the manner suggested by the Hafifs

would be a "disturbing abuse of Section 425.16 . . . which has undermined the exercise of the constitutional rights to freedom of speech and petition for the redress of grievances." Respondent's Brief p. 38. It was further argued that "participation [in petitioning activities] should not be chilled through abuse of the judicial process or Section 425.16." Respondent's Brief p. 39. The "Issues Presented" section of the Respondent's Brief included whether the statute should be construed to defeat a subsequent malicious prosecution case based upon the filing of a SLAPP. Respondent's Brief p. 10. See also, "[the Anti-SLAPP statute] should only be broadly construed when to do so would be consistent with the goals of the statute and the intent of those enacting it." Respondent's Brief p. 3. Further, Mrs. Hutton argued that it was axiomatic the statute was never intended to be used in this manner. Respondent's Brief p. 32. The Respondent's Brief also argued that Hafif was not exercising any right to petition when he filed the underlying lawsuit. Respondent's Brief pp. 2-3.

By way of a Request for Judicial Notice, which was granted, Mrs. Hutton also presented argument that it would be "Illogical to construe the statute to protect the precise conduct it was intended to prohibit." Respondent's Second Supplemental Brief, pp. 3-4. Citing to California Code of Civil Procedure Section 425.17, Mrs. Hutton argued that the granting of the Hafif defendants' motion would defeat her right to petition and chill petitioning rights. Respondent's Second Supplemental Brief, p. 4. Later in that brief, Mrs. Hutton argued that the grant of the Hafif defendants' Anti-SLAPP motion would "undermine the exercise of the constitutional right of freedom of speech and petition for redress of grievances." Respondent's

Second Supplemental Brief, p. 11. "If there ever were a case where the Anti-SLAPP statue was being used to 'undermine the exercise of the constitutional rights of freedom of speech and petition for redress of grievances,' this is it." Respondent's Second Supplemental Brief, pp. 11-12.

In its May 11, 2004 opinion, the California Court of Appeal for the Second Appellate District did not discuss these points and rejected these arguments, *sub silento*.

After the May 11, 2004, opinion, Mrs. Hutton sought rehearing. In the Petition for Rehearing she argued that the Hafif defendants' filing of the underlying suit was not an act in furtherance of the exercise of the right to petition. Petition for Rehearing, pp. 9-11. Mrs. Hutton also argued that it makes no logical sense to construe the statute to protect a SLAPPer (Petition for Rehearing, p. 13) and that Hafif should not be able to use the statute to defeat her right to petition for redress after filing the underlying lawsuit in an effort to punish Mrs. Hutton for exercising her right to petition. Petition for Rehearing, p. 13. She also argued that the Court of Appeal should not construe the statute in a way which would chill the constitutional right to petition for redress of grievances. Petition for Rehearing, p. 55. The Petition for Rehearing was denied.

After the Petition for Rehearing was denied, Mrs. Hutton filed a Petition for Review with the California Supreme Court. That Petition argued that the Supreme Court should grant review because the statute as construed and applied by the Court of Appeal allows Hafif to use the statute to chill the exercise of the constitutional right to free speech and petition. Petition for Review, p. 4.

Mrs. Hutton Complains to the California State Bar

Mrs. Terrie Hutton first became a client of Herbert Hafif and the Law Offices of Herbert Hafif (hereinafter referred to collectively as the "defendants" or "Hafif") in 1991, with respect to a discrimination case against GTE. Mrs. Hutton became disenchanted with Hafif when the case settled and Hafif attempted to charge her $60,000 in costs, after originally inducing her to agree to the settlement by representing that the costs were only $25,000. When a dispute arose over this discrepancy, Mrs. Hutton filed a complaint with the State Bar of California.

Mrs. Hutton's Lawyer Files A SLAPP Suit Against Her

In response, on May 6, 1994, Hafif filed a lawsuit in Orange County Superior Court against Mrs. Hutton and seven other defendants, all of whom were either former clients or employees of Hafif.[1] (This case is referred to throughout this Petition as the "underlying lawsuit" or the "*Killingsworth* action".)

The 46-page complaint in the underlying lawsuit named Mrs. Hutton as a defendant in five causes of action: fraud, criminal profiteering and commercial espionage, tortious interference with business relationships, slander and libel, and invasion of privacy. After demurrers were

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[1] *Law Offices of Herbert Hafif; Herbert Hafif v. Max Killingsworth; Terry Schielke; Phillip E. Benson; Leo Barajas; Sasson Sales; Peggy J. Soukup; Terrie Hutton; Clyde Jones*; Orange County Case No. 72934. It was first filed on May 6, 1994 and not concluded until the Court of Appeal opinion was issued on April 27, 2000.

sustained to the complaint and the first amended complaint, a second amended complaint was filed on October 13, 1994.

The claims against Mrs. Hutton for fraud, criminal profiteering, commercial espionage and invasion of privacy were not included in the Second Amended Complaint. The Second Amended Complaint asserted causes of action for malicious prosecution, defamation and tortious interference with prospective advantage. Mrs. Hutton was named as a defendant in each cause of action.

Suing a client because she has complained to the State Bar is specifically forbidden by the California Business and Professions Code. Business and Professions Code Section 6094(a). Even a cursory examination of the legal texts available to all practicing lawyers in California would have revealed this. See, TRG, *California Practice Guide*, "Professional Responsibility" (2000) Section 11:376. Evidence showed that, at least by the time the amended complaint was filed, Hafif had actual knowledge of the prohibitions of Business and Professions Code Section 6094(a).

Nonetheless, in Mr. Hafif's testimony taken five days after he filed the Second Amended Complaint in the underlying lawsuit, Hafif said of Mrs. Hutton, Mr. Killingsworth and Mr. Clyde Jones:

> " . . . I'm coming after all of those guys. Count on it. I'm not stopping until you're done. Count on it. . . . "

The *Hafif v. Killingsworth* SLAPP Is Terminated in Mrs. Hutton's Favor

On December 9, 1996, Judge Robert E. Thomas found the Hafif defendants' underlying lawsuit to be a meritless SLAPP. On April 27, 2000, that judgment was affirmed by a unanimous panel of the Fourth District Court of Appeal of the State of California.

The alleged basis of the underlying SLAPP was succinctly stated by Justice Rylaarsdam:

> "Hutton's allegedly actionable conduct consisted of her making complaints to the State Bar. Such statements clearly fall within the actions protected by the statute [California Code of Civil Procedure Section 425.16]." Opinion of Justice Rylaarsdam in *Law Offices of Herbert Hafif, et al. v. Soukup, et al.* (Fourth Appellate District No. G020977, filed April 27, 2000) App. p. 56, at p. 60.

No reasonable attorney could ever have believed the Hafifs had probable cause to sue Mrs. Hutton because she made complaints to the State Bar. Not only are such communications privileged, the initiation of such a suit is *expressly forbidden*. Business and Professions Code Section 6094(a). See, TRG, *California Practice Guide*, "Professional Responsibility" (2000) Section 11:376.

Moreover, there has never been any showing of a legal or factual basis for the claims of fraud, criminal profiteering, commercial espionage or invasion of privacy asserted by Hafif against Mrs. Hutton, nor could there ever be as,

in California, the claims of criminal profiteering and commercial espionage are not even civil torts.[2]

Mrs. Hutton Files A Malicious Prosecution Complaint Against Hafif

Because the underlying action dragged on for six years, it seriously damaged both Mr. and Mrs. Hutton physically, emotionally and financially, and they were required to employ attorneys to defend themselves. After the underlying action was terminated in her favor on November 30, 2000, Mrs. Hutton instituted this lawsuit against Hafif, seeking recovery of these damages. The complaint alleged that the defendants knowingly, willfully, maliciously and intentionally inflicted emotional and financial harm on plaintiff by filing and prosecuting the underlying action.

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[2] The caption of the *Killingsworth* complaint describes the second cause of action as "Criminal Profiteering and Commercial Espionage". However, in the body of the complaint, the cause of action is titled:

> "Claim under California Penal Code Section 186.2 et seq. (California Control of Profits of Organized Crime Act)" The actual charging allegations are that Mrs. Hutton committed, or attempted to commit "various crimes listed and defined in Sections 182 and 186.2(a)(22) of the California Penal Code". The same cause of action alleges Mrs. Hutton also violated "Section 487 et seq. of the California Penal Code" and "Section 518 of the California Penal Code."

When someone from the Hafif office finally did some legal research on these claims, it was internally conceded that no civil claim existed for violation of these statutes: "Benson demurs to the Second Cause of Action on the grounds that the California RICO statute, Penal Code Section 186.2 does not provide a private right of action. Benson appears to be correct. . . ."

Hafif Seeks To Use The Anti-SLAPP Statute To Protect The Filing Of His SLAPP

Four months after filing their answer, and on the eve of their depositions, on June 28, 2001, the Hafif defendants sought permission, *ex parte*, to file a special motion to strike pursuant to California Code of Civil Procedure Section 425.16. Although opposed, the request to file the Anti-SLAPP motion was granted. The depositions were stayed along with all other discovery.

On August 22, 2001, Mrs. Hutton timely opposed the Anti-SLAPP motion. The SLAPPer's motion to strike was heard on June 27, 2002. Judge Alban I. Niles denied the motion. Judge Niles expressly found there was no probable cause to file the *Killingsworth* lawsuit against Mrs. Hutton.

On September 12, 2002, Judge Niles reconsidered and changed that part of his order stating there was no probable cause to bring the underlying action. He ruled by Minute Order which advised his decision denying the Motion to Strike was "proper and is allowed to stand." Defendants were to give notice.

Defendants did not do so. Instead, the Hafif defendants submitted a proposed attorney order to a different judge, Judge Paul Gutman. Judge Gutman had not reconsidered anything nor participated in any proceedings. Nonetheless, Judge Gutman signed the Hafif attorney order on October 10, 2002. Notice of Entry of Judgment of Judge Gutman's Order was given by defendants on October 16, 2002.

On October 17, 2002, defendants filed a Notice of Appeal.

On May 11, 2004, the Court of Appeal of the State of California, Second Appellate District, Division Five reversed. App. p. 1, at p. 11. Without any discussion whatsoever, the Court of Appeal found Mrs. Hutton's malicious prosecution suit to be an action arising out of the furtherance of the Hafif defendants' right to petition. App. p. 8. As a result of this finding, the Court of Appeal, after examining the showing made in opposition to the motion[3], ordered the Trial Court to summarily dismiss her case. App. p. 11. Thus, in the guise of an effort to protect Hafif's conduct in suing his client for reporting him to the California State Bar, Mrs. Hutton was deprived of her right to petition for redress of grievances. Ironically, both the Trial Court and the Court of Appeal in the underlying lawsuit had found Mr. Hafif's filing of that action against Mrs. Hutton not to be a valid exercise of his right to petition.

Mrs. Hutton timely filed a Petition for Rehearing which was denied. She then filed a timely Petition for Review which was denied by the California Supreme Court on July 28, 2004. App. 16. Less than ninety days later, the California Supreme Court granted review in three companion cases arising out of the same conduct. App. pp. 51, 52. The question accepted for review by the California Supreme Court in these matters is whether the California Anti-SLAPP statute can be invoked by a SLAPPer to protect the filing of his SLAPP. App. p. 53.

[3] Mrs. Hutton did not have the benefit of any discovery. Per the statute, discovery was stayed pending a ruling on the Anti-SLAPP motion.

The Related Appellate Rulings:

Soukup v. Hafif, Terry Hutton v. Hafif and *Soukup v. Stock*

Peggy Soukup, a former employee of Hafif, was also named as a defendant in the *Killingsworth* action. The case against her was simultaneously dismissed as a SLAPP and the attorney SLAPPer appealed to the Fourth District. Both her case and Mrs. Hutton's case were consolidated and the opinion of the Fourth District which issued affirmed the trial court in both cases.[4]

Mrs. Terrie Hutton's husband, Mr. Terry Hutton, then brought suit against the Hafif defendants in a separate action.[5] Mr. Hutton's suit was predicated on the same conduct as Mrs. Terrie Hutton's case.

Ms. Soukup also sued the SLAPPer attorney for malicious prosecution and the two lawsuits brought by Mrs. Hutton and her husband were consolidated with the Soukup case. The SLAPPer attorney also sought to use the Anti-SLAPP statute against SLAPP victim Soukup and Mr. Hutton.

Superior Court Judge O'Brien denied the SLAPPer's motion to strike in both Mr. Hutton's case and in Soukup's case. He found the Anti-SLAPP statute cannot be used to deprive a victim of a SLAPP of her constitutional right to petition for redress of grievances. After the Anti-SLAPP

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[4] *Law Offices of Herbert Hafif, et al. v. Soukup, et al.*, April 27, 2000 (4th No. G020977) App. p. 56.

[5] *Terry Hutton v. Herbert Hafif, et al.*, Los Angeles County Superior Court Case No. BC241082.

motion was denied, Mr. Hutton dismissed his case. Nevertheless, the attorney SLAPPer separately appealed each ruling. All three appeals were eventually set in Division Five of the Second District Court of Appeal for the State of California.

Another appeal was consolidated with *Soukup v. Hafif, Soukup v. Stock*[6], an action brought by Soukup against Hafif's attorney, Stock, for malicious prosecution of the Orange County SLAPP. Judge O'Brien denied Stock's Anti-SLAPP motion and Stock also appealed. On May 27, 2004, the Court of Appeal issued a partially published decision in *Soukup v. Stock* (B154311), reversing the trial court. Petitions for Rehearing were filed by Soukup and Mr. Hutton.

Petitions for Review were filed by Soukup in *Soukup v. Stock* (October 17, 2002, No. B154311) 2002 Cal. LEXIS 9675, App. p. 55, and *Soukup v. Hafif* (August 16, 2002, B152759 and B154184) 2002 Cal.App. Unpub. LEXIS 7722. App. p. 53. A petition for Review was also filed by Mr. Hutton.

On October 20, 2004, the California Supreme Court granted review in *Soukup v. Stock, Soukup v. Hafif* and *Terry Hutton v. Hafif*. The Hutton and Soukup Petitions were consolidated and assigned a single Supreme Court case number (S126715). App. pp. 52, 53.

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[6] *Soukup v. Ronald Stock, et al.*, No. B154311.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA COURT OF APPEAL VIOLATED MRS. HUTTON'S FIRST AMENDMENT GUARANTEES OF THE RIGHT TO PETITION AND ACCESS TO THE COURTS WHEN IT PRECLUDED HER FROM SEEKING JUDICIAL REDRESS FOR THE DAMAGES RESULTING FROM THE HAFIF DEFENDANTS' MALICIOUSLY INSTITUTED PRIOR LAWSUIT

In the California Court of Appeal, the Hafif defendants asserted that their constitutional right to petition compelled an order summarily dismissing Mrs. Hutton's lawsuit under the Anti-SLAPP statute. In fact, the California Court of Appeal violated Mrs. Hutton's First Amendment guarantees of the right to petition and access to the courts when it precluded her from seeking judicial redress for the damages resulting from the Hafif defendants' maliciously instituted prior lawsuit (which was based on Mrs. Hutton's absolutely privileged conduct).

This Court has long held that the First Amendment's protection of a citizen's right to petition the government for redress of grievances encompasses a private person's attempt to recover damages from another private person by way of litigation. See, e.g., *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 578-579 (1971); *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222-223 (1967); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964). This Court has recognized that "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose,

with the other First Amendment rights of free speech and free press." *Mine Workers v. Illinois Bar Assn., supra*, 389 U.S. at p. 222; see also *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The First Amendment right to petition and the corollary constitutional right of access to the court system are applicable to the states through the Fourteenth Amendment. *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

In the present case, Mrs. Hutton filed a lawsuit to recover the damages she sustained as a result of the Hafif defendants' earlier action against her wherein they alleged the following causes of action: fraud; criminal profiteering and commercial espionage; tortious interference with business relationships; slander and libel; and invasion of privacy. The Hafif defendants' lawsuit against Mrs. Hutton was premised entirely upon Mrs. Hutton's complaint about the Hafif defendants' unethical conduct to the California State Bar. Mrs. Hutton's act of complaining to the California State Bar is absolutely privileged under California law. California Business and Professions Code, Section 6094(a). Though Mrs. Hutton was ultimately able to defeat the Hafif defendants' lawsuit against her, it took six years of litigation (including a successful Anti-SLAPP motion by Mrs. Hutton and an unsuccessful appeal filed by the Hafif defendants) before the Hafif defendants' completely unjustified lawsuit was finally terminated in favor of Mrs. Hutton. In the meantime, Mrs. Hutton suffered serious and substantial financial, physical, emotional and reputation damages.

Demonstrating sheer gall, the Hafif defendants sought to have Mrs. Hutton's lawsuit summarily dismissed on the basis that it purportedly was a SLAPP lawsuit – even though it was grounded on the damages resulting from

their SLAPP lawsuit against Mrs. Hutton. The trial court denied the Hafif defendants' Anti-SLAPP motion because the Anti-SLAPP statute was intended to protect people like Mrs. Hutton from SLAPP lawsuits, not to protect those like the Hafif defendants against being held accountable for the damage they cause when they file SLAPP litigation.[7] Turning the intent of the Anti-SLAPP statute on its head, the California Court of Appeal superficially focused upon a case which held that malicious prosecution actions may be subject to the Anti-SLAPP statute without properly examining whether to do so in the context of the present malicious prosecution action would be antithetical to the purpose of the Anti-SLAPP statute, and ordered that Mrs. Hutton's action be summarily dismissed. App., p. 11.

What possible justification exists to warrant the government's interference with Mrs. Hutton's constitutional rights under the First Amendment to seek redress of her grievances and to gain access to the courts? The California Court of Appeal did not answer this question and, in fact, no justification exists.

The California Legislature included an explanation of its intent when passing the Anti-SLAPP legislation in 1992:

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[7] The California Supreme Court has granted review in the companion cases filed against the Hafif defendants by Mrs. Hutton's husband and another person based on the identical facts presented by the instant case. The precise issue which will be determined by the California Supreme Court is whether the Hafif defendants, whose SLAPP suit has been dismissed under California's Anti-SLAPP statute, can invoke the Anti-SLAPP statute against an ensuing action based on the filing of the original SLAPP suit. App., p. 53.

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

California Code of Civil Procedure Section 425.16(a).

Recognizing that the Anti-SLAPP statute had been grossly abused in the 11 years since its enactment, in 2003, the California Legislature enacted Code of Civil Procedure Section 425.17, which provides, in relevant part:

> The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

California Code of Civil Procedure Section 425.17(a).

This is precisely the situation of the present case. The Hafif defendants sought to chill Mrs. Hutton's exercise of her absolute right to complain to the California State Bar about their unethical conduct (and to discourage others

who were similarly situated from also complaining to the California State Bar) by filing a SLAPP suit against her. Since Mrs. Hutton's complaint to the California State Bar was *absolutely privileged* (California Business & Professions Code Section 6094(a)), the Hafif defendants' lawsuit against her was dismissed under the Anti-SLAPP statute. This was an absolutely proper invocation and application of the Anti-SLAPP statute. Regrettably, it took six years to achieve a final disposition of the dismissal of the Hafif defendants' bogus lawsuit. Moreover, the pendency of the bogus action and the litigation required to defeat it caused substantial damage to Mrs. Hutton's finances, physical and emotional well being and reputation. Yet, when Mrs. Hutton sought redress for the damages wrongfully inflicted upon her by the Hafif defendants' maliciously instituted lawsuit, the SLAPPers were permitted to invoke the Anti-SLAPP statute, thereby slamming shut the courtroom doors.

Applying California's Anti-SLAPP statute under such circumstances constitutes an unconstitutional violation of the First Amendment's protection of citizens' right to petition for redress through unimpeded access to the courts.

Twenty-two (22) states in addition to California have adopted some form of Anti-SLAPP legislation.[8] This Court

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[8] These states are: Delaware (Delaware Code chapter 81 Sections 8136 through 8138); Florida (Florida Statutes Section 768.295); Georgia (Georgia Code Section 9-11-11.1); Hawaii (Hawaii Revised Statutes chapter 634F); Indiana (Indiana Code Section 34-7-7); Louisiana (Louisiana Code of Civil Procedure article 971); Maine (14 Maine Revised Statutes chapter 203 Section 556); Maryland (Maryland Code Section 5-807); Massachusetts (Massachusetts General Laws chapter 231, Section 59H); Minnesota (Minnesota Statutes Sections 554.01 through 554.05); Missouri (Missouri Revised Statutes Section 537.528); Nebraska (Nebraska Revised Statutes

(Continued on following page)

should grant this petition for writ of certiorari in order to explain that even well-meaning legislation can deprive those persons it intends to protect of their constitutional rights when the legislation is abused by those it is designed to keep at bay.

II. MRS. HUTTON HAS BEEN DEPRIVED OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE NO RATIONAL BASIS EXISTS FOR APPLYING THE ANTI-SLAPP STATUTE TO A LAWSUIT PREMISED UPON THE HAFIF DEFENDANTS' EARLIER MALICIOUS INSTITUTION OF A SLAPP SUIT

This Court recently described the scope of the Fourteenth Amendment's substantive due process protection:

> "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' [Citation.] The Clause also includes a substantive component that 'provides heightened protection

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Sections 25-21,241 through 25-21,246); Nevada (Nevada Revised Statutes Sections 41.635 through 41.670); New Mexico (New Mexico Revised Statutes Sections 38-2-9.1 through 38-2-9.2); New York (Civil Rights Sections 70-a and 76-a); Oklahoma (Oklahoma Statutes Section 12-1443.1); Oregon (Oregon Revised Statutes Sections 31.150 through 31.155); Pennsylvania (27 Pennsylvania Statutes Sections 8301 through 8305); Rhode Island (Rhode Island General Laws Sections 9-33-1 through 9-33-4); Tennessee (Tennessee Code Sections 4-21-1001 through 4-21-1004); Utah (Utah Code Sections 78-58-101 through 78-58-105); and Washington (Washington Revised Code Sections 4.24.500 through 4.24.520).

> against government interference with certain fundamental rights and liberty interests.' [Citations.]" *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

In *Troxel*, this Court found that a state's statute permitting non-parents to petition courts for visitation rights, while perhaps not unconstitutional on its face, was unconstitutional as applied to the mother in that case who objected to her children being ordered by the court to visit their paternal grandparents. This Court held that, under the circumstances presented by this particular mother, the statute violated the mother's liberty interest in the care, custody and control of her children, and therefore her substantive due process rights. *Ibid.* This Court pointed out that the statute did not require the trial judge to accord any deference to a parent's decision. To the contrary, it vested a trial court with the power to supplant the parent's decision. *Ibid.* Moreover, the statute did not require a showing that the parent was unfit to make decisions concerning his or her child's best interest. *Ibid.*

Similarly, Mrs. Hutton has been damaged by the Hafif defendants' malicious institution of a SLAPP suit, filed in response to her complaint about them to the California State Bar. Mrs. Hutton possesses a property right in the form of a cause of action to recover damages for her injuries. *Logan v. Zimmerman*, 455 U.S. 422, 428-430 (1982); *Martinez v. California*, 444 U.S. 277, 281-282 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Yet, the Court of Appeal applied the Anti-SLAPP statute in a manner which stripped Mrs. Hutton of this property right. While the Anti-SLAPP statute, on its face, may be constitutional and, in fact, desirable, even the California Legislature has recognized that it has the potential of being abused if applied in a manner that is

antithetical to its original purpose. See California Code of Civil Procedure Section 425.17(a) ["The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16"].

The Legislature had a rational basis for originally enacting the Anti-SLAPP statute: To encourage public participation in matters of public interest (such as reporting unethical attorneys to the appropriate governmental disciplinary agency) by providing a mechanism to summarily dismiss lawsuits that are filed to discourage such participation. However, there is absolutely no rational basis for discouraging a lawsuit that is filed against a SLAPPer to recover damages resulting from the SLAPPer's inappropriate conduct. Indeed, dismissing such suits will only encourage SLAPPers to file such suits since they will be able to evade responsibility for the havoc they cause simply by getting legal actions brought against them summarily dismissed under the Anti-SLAPP statute.

This irrational application of a rational statute was pointed out in letters written in support of Mrs. Hutton's petition for review in the California Supreme Court by the legislators who authored California's Anti-SLAPP statute. State Senator Sheila Kuehl's letter stated, in part: "Using the anti-SLAPP statute to protect a SLAPP suit is a logical contradiction." App., p. 65. State Senator Gloria Romero wrote: "The use of the anti-SLAPP statute to protect the filings of a SLAPP suit as a means of punishing the SLAPP victim is of great concern. This, I believe, is an

unambiguous and unsupportable example of abuse of the statute." App., p. 67.

This Court should grant this petition for writ of certiorari. When an Anti-SLAPP statute is applied as it was in this case by the California Court of Appeal, it deprives a citizen of her constitutionally protected right to petition for redress of grievances and violates substantive due process rights of the party injured by the original SLAPP suit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue, so that this case may be fully briefed and argued on the merits of the questions presented.

Respectfully submitted,

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DATED: November 26, 2004

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

TERRIE HUTTON, Plaintiff and Respondent v. HERBERT HAFIF et al., Defendants and Appellants.	B162572 (Los Angeles County Super. Ct. No. BC241082) (Filed 5/11/04)

APPEAL from an order of the Superior Court of Los Angeles County, Paul Gutman, Judge. Reversed with directions.

Cheong, Denove, Rowell & Bennett, John D. Rowell for Plaintiff and Respondent.

Law Offices of Herbert Hafif, Jeanne A. Sterba; and Law Offices of James J. Moneer, James J. Moneer for Defendants and Appellants.

I. INTRODUCTION

Herbert Hafif, Cynthia D. Hafif, Gregory K. Hafif, and the Law Offices of Herbert Hafif (the Hafif firm) (defendants), appeal from an order denying their special motion to strike (Code Civ. Proc.,[1] § 425.16) a malicious prosecution

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

action brought by Terrie Hutton (plaintiff). The present lawsuit arose after an action brought by defendants was dismissed pursuant to section 425.16. We reverse the order and direct the trial court to grant the section 425.16 motion in the present lawsuit.

II. BACKGROUND

A. The First Lawsuit

Plaintiff originally sued Herbert Hafif and the Hafif firm for legal malpractice on June 29, 1993. Plaintiff's legal malpractice action against Herbert Hafif and the Hafif firm was dismissed after a demurrer to her second amended complaint was sustained without leave to amend. Los Angeles Superior Court Judge Melvin Grover imposed $25,000 in sanctions against plaintiff and her attorney, Sassoon Sales, for filing in bad faith a frivolous lawsuit. The judgment of dismissal and the sanctions order were reversed on appeal. Division Two of the Court of Appeal for this appellate district found plaintiff had stated a fiduciary duty breach cause of action. (*Hutton v. Hafif* (Aug. 20, 1997, B088405) [nonpub. opn.].) According to the superior court's online records, plaintiff's legal malpractice action was later dismissed for failure to prosecute. (http://www.lasuperiorcourt.org/CivilCaseSummary/casesummary.asp?Referer=index&divCode=CV&Case=BC084002Source//CAS.)

B. The Second Lawsuit

In the second lawsuit, *Law Offices of Herbert Hafif v. Killingsworth* (Super Ct. Orange County, 1996, No. 729347), defendants alleged plaintiff had conspired with others to coerce financial concessions from the Hafif firm

by bringing specious legal malpractice lawsuits against it and instigating negative publicity about it. The original *Killingsworth* complaint, filed on May 6, 1994, asserted causes of action against plaintiff for fraud, criminal profiteering, tortious interference with business relations, slander and libel, and privacy invasion. The causes of action asserted against plaintiff in the second amended complaint in *Killingsworth,* filed on October 13, 1994, were for malicious prosecution, defamation, and tortious interference with business relations.

In addition to the fact that plaintiff filed a legal malpractice action against Mr. Hafif and his firm, which the trial court found to be frivolous, the principle conspiracy evidence against her consisted of diaries she had kept. The diaries purportedly document plaintiff's contacts with other members of the alleged conspiracy. Orange County Superior Court Judge Leonard Goldstein denied plaintiff's summary judgment motion in the second lawsuit. Judge Goldstein found there were triable issues of material fact as to plaintiff's participation in the alleged conspiracy based on her diaries. Plaintiff's subsequent special motion to strike pursuant to section 425.16 was granted. In connection with that motion, Orange County Superior Court Judge Robert E. Thomas ruled that plaintiff's diaries were inadmissible. Division Three of the Court of Appeal for the Fourth Appellate District affirmed Judge Thomas's order granting the special motion to strike. (*Law Offices of Herbert Hafif v. Soukup* (April 27, 2000, G020977) [nonpub. opn.].) The Court of Appeal held in part: "The only evidence potentially showing merit in Hafif's claims came from Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were inadmissible." (*Id.,* typed

opn. at p. 6.) As discussed below, the record before us shows plaintiff had prepared *summaries* of her diary entries – but not the diaries themselves – for Mr. Sales's use.

C. The Third Lawsuit

On November 30, 2002, plaintiff filed the present action alleging the second lawsuit, the Killingsworth matter, was maliciously prosecuted against her. On July 20, 2001, defendants filed a special motion to strike the present malicious prosecution action. Defendants presented evidence that: a former associate had left the Hafif firm, had taken clients with him, and had then sought to coerce defendants to relinquish claims for fees and costs in connection with those matters; further, numerous frivolous legal malpractice claims by former clients and State Bar of California complaints had been subsequently filed against them and negative publicity disseminated, in close proximity to each other; there was communication among the alleged conspirators, all former clients or employees of defendants; and a lawyer who represented some of the former clients in their legal malpractice actions subsequently apologized to defendants. Defendants argued in part that probable cause was established as a matter of law because Judge Goldstein had denied plaintiff's summary judgment motion in the second lawsuit, the Killingsworth action. Plaintiff opposed defendant's section 425.16 motion in this lawsuit. She presented evidence contradicting defendants' claim she had participated in a conspiracy against them. The special motion to strike was denied by Judge Alban I. Niles.

III. DISCUSSION

A. General Principles

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 68, fn. 5.) Section 425.16 authorizes a court to summarily dismiss such meritless suits. The purpose of the statute is set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ." Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . . ," in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 58; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

Section 425.16, subdivision (e), defines acts in furtherance of free speech or petition rights in connection with a public issue by setting forth four categories of conduct to which the statute applies. Section 425.16, subdivision (e) provides: "As used in this section, 'act in

furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." A specific public issue showing is required for acts claimed to fall under section 425.16, subdivisions (e)(3) and (e)(4), but not for acts claimed to fall under subdivisions (e)(1) and (e)(2). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1111-1123; *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 112-114.)

When a special motion to strike is made, the trial court must consider two components. First, the court must consider whether the moving defendant has carried its burden of showing that the lawsuit falls within the purview of section 425.16, i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that the plaintiff's cause of action arises out of the defendant's actions in the furtherance of petition or free speech rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of*

Santa Barbara (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1123, fn. 10.) The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 66.) Nor must a defendant show that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 88; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.)

Second, once the defendant meets this burden, the obligation shifts to the plaintiff to establish a probability that it will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) As to the second step of the weighing process, the Supreme Court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, described the trial judge's duties as follows: "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (Orig. italics; see *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5.) We conduct independent review of

the trial court's decision. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721; *Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1364.)

B. Defendant's Initial Burden

Here, defendants met their initial burden of establishing a prima facie case that plaintiff's causes of action arose out of their actions in the furtherance of their petition rights. (§ 425.16, subd .(b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.) Plaintiff's malicious prosecution claim arises out of defendants' filing and prosecution of the second lawsuit, the Killingsworth action. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-741; *Navellier v. Sletten, supra,* 29 Cal.4th at pp. 89-95.)

C. Plaintiff's Burden

We turn to the question whether plaintiff established a probability that she will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) The California Supreme Court has explained: "[I]n order to establish a cause of action for malicious prosecution . . . a plaintiff must demonstrate 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in [the plaintiff's] favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citations.]" (*Sheldon Appel Co. v. Albert & Oliker* (1989)

47 Cal.3d 863, 871-872; accord, *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 313.) Whether probable cause exists is a question of law. (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 817; *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512, disapproved on another point in *Zamos v. Stroud* (2004) 32 Cal.4th 958, ___ [12 Cal.Rptr.3d 54, 65].)

Judge Goldstein's denial of plaintiff's summary judgment motion in the second lawsuit, the Killingsworth action (in which she was a defendant) on the grounds there were triable issues of material fact established that probable cause existed as a matter of law. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382-385; accord, *White v. Lieberman* (2002) 103 Cal.App.4th 210, 217-218; cf. *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at pp. 816-826 [trial court's denial of defendant's section 425.16 motion to strike established probable cause].) As the Supreme Court explained in *Wilson,* "Denial of a defense summary judgment motion on grounds that a triable issues [sic] exists . . . while falling short of a determination of the merits, establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 824; accord *Bealmear v. So. Cal. Edison Co.* (1943) 22 Cal.2d 337, 340.)

Plaintiff contends, but has not established, that the summary judgment denial in the second lawsuit, the Killingsworth action, was obtained by material misrepresentations of fact with respect to her diaries. Plaintiff claims defendants were in possession of her diary entries, on which they relied in opposing that summary judgment motion, only through a court reporter's inadvertent error,

not by any legitimate means, and in violation of a stipulation among counsel; therefore, defendants' authentication of the evidence rested on material misrepresentations of fact. Defendants assert plaintiff was ordered to produce the diaries in the second lawsuit; however, their citation to the record does not support that claim. In any event, the record before us does *not* support plaintiff's claim. At her deposition in the underlying action, on April 24, 1995, plaintiff said she had prepared *summaries* of her diary entries – but not the diaries themselves – for "the use of" her attorney. In addition, there was an indication the summaries reflected communications between plaintiff and her then attorney, Mr. Sales. Counsel agreed the summaries would not be attached as an exhibit to plaintiff's deposition transcript until they had resolved admissibility issues. There is no evidence the diary entries, as opposed to the summaries, were not made at the time of the events recorded therein. Moreover, later, by way of a declaration dated October 5, 1995, *plaintiff* herself introduced her diary entries as evidence in the second lawsuit, the Killingsworth action. Judge Goldstein subsequently relied on the diaries in denying plaintiff's summary judgment motion in the second lawsuit, the Killingsworth action, on February 6, 1996. On this record, we cannot conclude that the order denying summary judgment in the second lawsuit, the Killingsworth action, was obtained by material misrepresentations of fact. Judge Goldstein, who ruled on the summary judgment motion in the underlying case, made no such finding.

We are mindful that Judge Thomas granted plaintiff's section 425.16 motion to strike in the second lawsuit, the Killingsworth action, based on the *exclusion* of the very evidence on which Judge Goldstein had *relied* in

denying her summary judgment motion. Judge Thomas's ruling granting the special motion to strike in the second lawsuit, the Killingsworth action, did not undermine the effect of the [sic] Judge Goldstein's order denying summary judgment in terms of the probable cause analysis. As the Supreme Court held in *Wilson,* "Claims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 818; accord, *Bealmear v. So. Cal. Edison Co., supra,* 22 Cal.2d at p. 340.) As noted above, plaintiff submitted evidence contradicting defendants' allegations in an effort to establish evidentiary support for her malicious prosecution claim in this lawsuit. Defendants' showing they had probable cause to bring the underlying action, however, defeats that evidence. (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821; see *Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1365.) Accordingly, the order denying defendants' section 425.16 special motion to strike must be reversed.

IV. DISPOSITION

The order denying the special motion to strike pursuant to Code of Civil Procedure section 425.16 brought by defendants, Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Gregory K. Hafif, is reversed. The trial court is directed to enter a new order granting the special motion to strike. Defendants, Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Gregory K. Hafif, are to recover their costs on appeal from plaintiff, Terrie Hutton. Any attorney fee motion must be

pursued in compliance with rule 870.2(b) of the California Rules of Court.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG J.

MOSK, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

TERRIE HUTTON, Plaintiff, v. HERBERT HAFIF, LAW OFFICES OF HERBERT HAFIF, CYNTHIA D. HAFIF, GREGORY K. HAFIF, RONALD C. STOCK, LAW OFFICES OF RONALD C. STOCK, WYLIE A. AITKEN, LAW OFFICES OF WYLIE A. AITKEN, DARREN O. AITKEN, and DOES 1 through 500, inclusive Defendants.	CASE NO. BC241082 Assigned to For All Purposes: Honorable Alban I. Niles Dept. 34 **ORDER RE HAFIF DEFENDANTS MOTION FOR CORRECTION OF CLERICAL ERROR** (Filed Oct. 10, 2002)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Upon reviewing the filed papers, it is hereby ordered that:

1. Defendants Law Offices of Herbert Hafif, Herbert Hafif, Greg Hafif, and Cynthia D. Hafif (hereinafter "Hafif defendants") Motion for Correction of Clerical Error and to vacate the June 27, 2002 Minute Order came on regularly for hearing on September 12, 2002 in Department 34 of the above-entitled Court, the Honorable Alban I. Niles, Judge, presiding.

2. Plaintiff Hutton's Request for Judicial Notice of the Second District Court of Appeal's Unpublished Opinion in *Soukup v. Law Offices of Herbert Hafif, et al.*,

Appellate Court case number B109041, Los Angeles County Superior Court case number BC103023 consolidated with BC106737 to *Evidence Code* Sections 452 and 453 is Granted;

3. Defendant's motion pursuant to *Code of Civil Procedure* Section 473(d) was denied as not being procedurally correct inasmuch as there was no clerical error;

4. The Court exercised its discretion and vacated the June 27, 2002 Minute Order, ordering that a new order be entered to accurately reflect the Fourth District Court of Appeal Opinion filed April 27, 2000, in G020977, Orange County Superior Court case number 729347 finding that Hafif had failed to show a probability of prevailing rather than a finding that Hafif lacked probable cause for filing and maintaining the lawsuit;

5. The Court based its decision on the language contained in the April 27, 2000 Opinion as well as the distinction between the probability of prevailing standard set forth in *Code of Civil Procedure* Section 425.16 and the probable cause standard set forth in *VanZant v. Daimler Chrysler* (2002) 96 Cal.4th 1283, 1289;

6. The Court further opined that it could not be determined from the April 27, 2000 Opinion whether the issue of whether Hafif had probable cause for filing the underlying suit in Orange County Superior Court had been determined;

7. The Court further opined that the Hafif defendants' special motion to strike pursuant to *Code of Civil Procedure* Section 425.16(b)(1) was denied since the Hafif defendants had not met the first prong of the statute; and

8. That this Court adopts the opinion of Judge Gregory O'Brien in *Soukup v. Hafif* dated July 27, 2001 and the defendants should file a motion for summary judgment.

No further orders were made.

Dated: 10/10/02

/s/ Paul Gutman
Superior Court Judge

(SEAL)

TERRIE HUTTON, Plaintiff and Respondent, v. HERBERT HAFIF et al., Defendants and Appellants.

S125728

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 7067

July 28, 2004, Filed

OPINION: Petition for review denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. HERBERT HAFIF, et al., Defendants and Appellants.	B152759 consolidated with B154311 (Los Angeles County Super. Ct. No. BC247941)
TERRY HUTTON, Plaintiff and Respondent, v. HERBERT HAFIF, et al., Defendants and Appellants.	B154184 (Los Angeles County Super. Ct. No. BC249367) (Filed 6/30/04)

APPEAL from orders of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Reversed with directions.

Aitken Aitken & Cohn, Darren O. Aitken, Wylie A. Aitken for Defendants and Appellants Wylie A. Aitken and the Law Offices of Wylie A. Aitken.

Law Offices of Herbert Hafif, for Defendants and Appellants Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Greg K. Hafif.

Cheong, Denove, Rowell & Bennett and John D. Rowell for Plaintiff and Respondent Terry Hutton.

Peggy J. Soukup in pro. per. for Plaintiff and Respondent Peggy J. Soukup.

I. INTRODUCTION

Defendants, Wylie A. Aitken, the Law Offices of Wylie A. Aitken, the Law Offices of Herbert Hafif, Herbert Hafif, Cynthia D. Hafif, and Greg K. Hafif,[1] appeal from a November 16, 2001, order denying their Code of Civil Procedure section 425.16[2] special motions to strike the abuse of process and malicious prosecution complaint of plaintiff, Peggy J. Soukup, filed April 2, 2001, in Superior Court case No. BC247941. Based in material part on our opinion in *Soukup v. Stock* (May 27, 2004, B154311) ___ Cal.App.4th ___, ___-___ [14 Cal.Rptr.3d 82, 83-89, mod. on den. rehg. 2004 WL 1376385], which arises out of the same superior court case commenced by Ms. Soukup, we reverse the orders denying the special motions to strike. Additionally, the Hafif defendants appeal from the November 27, 2001, denial of their special motion to strike the April 26, 2001, complaint for intentional severe emotional distress infliction filed by plaintiff, Terry Hutton, in Superior Court case No. BC249367. As in the case of the appeal involving Ms. Soukup, the November 27, 2001, order denying the special motion to strike will be reversed. As to both of the cases pursued by Ms. Soukup and Mr. Hutton, we remand for the trial court to

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[1] For purposes of clarity and not out of any disrespect, Greg K. Hafif will be referred to as Greg and Herbert Hafif as Mr. Hafif. On some occasions, Mr. Hafif, his relatives, and his firm will be referred to collectively as the Hafif defendants. Likewise, Mr. Aitken and his firm will be referred to as the Aitken defendants.

[2] All future statutory references are to the Code of Civil Procedure.

impose attorney fees and costs pursuant to section 425.16, subdivision (c) in favor of defendants subject to our analysis in *Soukup* concerning attorneys appearing in pro se. (*Trope v. Katz* (1995) 11 Cal.4th 274, 279-282; *Soukup v. Stock, supra*, ___ Cal.App.4th at pp. ___-___ [2004 WL 1376385].)

II. MS. SOUKUP'S LAWSUIT

A. Mr. Aitken And His Firm

The Aitken defendants have been sued by Ms. Soukup in case No. BC247941 for malicious prosecution and abuse of process arising out of a lawsuit filed against her. The suit was filed or pursued by the Aitken defendants. The conduct is the same alleged against a codefendant, Ronald C. Stock. In *Soukup v. Stock, supra*, ___ Cal.App.4th at pages ___ through ___ [14 Cal.Rptr.3d at pages 86-89], we held that claims against Mr. Stock arose from the petition rights of his clients and such were within the protective ambit of section 425.16, subdivision (b)(1). (See *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735, [malicious prosecution claim arises from petition rights]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116, [special motion to strike may be pursued by defendant who makes statements on behalf of others].) This analysis applies equally to the Aitken defendants and the burden thus shifted to Ms. Soukup to demonstrate the minimal merit of her claims. (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93, *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63.)

We agree with the Aitken defendants that Ms. Soukup's argumentative and conclusory declaration and the

voluminous attached documents filed in opposition to the special motion to strike did not demonstrate her claims have minimal merit. As to the first cause of action, the mere filing of a lawsuit, does not constitute the tort of abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; *Friedman v. Stadum* (1985) 171 Cal.App.3d 775, 779-780; *Drasin v. Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485; *Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 904-905; *Christensen v. Younger* (1975) 47 Cal.App.3d 613, 617.) Further, there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra,* 42 Cal.3d at p. 1169; *Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 595.) As to the second cause of action, malicious prosecution, there is no evidence of: malice; an absence of probable cause at any time during the underlying lawsuit; or damage. Hence, there has been no prima facie showing of potential malicious prosecution liability on the part of the Aitken defendants. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.) Therefore, the order denying the special motion to strike of the Aitken defendants must be reversed.

B. The Hafif Defendants

The result is the same as to the Hafif defendants who are also sued in case No. BC247941. Ms. Hafif was alleged to be counsel for Mr. Hafif and his firm. All of our analysis as it relates to Mr. Aitken and his firm applies equally to Ms. Hafif. As to Greg, he was sued as a fictitiously named defendant apparently in his role as counsel

in the underlying lawsuit. Our analysis as to Ms. Hafif and the Aitken defendants applies equally to Greg.

As to Mr. Hafif and his firm, all of the abuse of process and malicious prosecution claims against them arise out of the underlying suit. Hence, the claims against them arise from the exercise of the right of petition. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 734-735; *Navellier v. Sletten, supra,* 29 Cal.4th at p. 90.) The burden then shifted to Ms. Soukup to demonstrate her abuse of process and malicious prosecution claims had minimal merit. (§ 425.16, subd. (b)(1); *Navellier v. Sletten, supra,* 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 63.) Our foregoing analysis as to Mr. Aitken and his firm has equal merit here: the mere filing of a lawsuit does not constitute the tort of abuse of process (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra,* 42 Cal.3d at p. 1169; *Friedman v. Stadum, supra,* 171 Cal.App.3d at pp. 779-780); there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit, an essential element of an abuse of process claim (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra,* 42 Cal.3d at p. 1169; *Loomis v. Murphy, supra,* 217 Cal.App.3d at p. 595); and as to the malicious prosecution claim, there is no evidence of malice, an absence of probable cause at any time during the underlying lawsuit, or damage. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at p. 885.) Therefore, the order denying the special motion to strike of Mr. Hafif and his firm must be reversed.

III. MR. HUTTON'S LAWSUIT

A. The Hafif Defendants' Initial Burden

On April 26, 2001, Mr. Hutton sued the Hafif defendants for intentional severe emotional distress infliction. Mr. Hutton's spouse is Terrie Hutton. Ms. Hutton was sued by Mr. Hafif and his firm. Mr. Hutton sought to recover for the emotional distress he experienced when Ms. Hutton was unjustifiably sued. The challenged conduct of the Hafif defendants involved their role either as counsel or parties in the underlying lawsuit. Hence, Mr. Hutton's severe emotional distress claims arise from defendants' petition related conduct in the underlying lawsuit. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 734-735; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at pp. 1116; *Soukup v. Stock, supra,* ___ Cal.App.4th at pp. ___-___ [14 Cal.Rptr.3d at pp. 86-89]; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152-153.) The burden thus shifts to Mr. Hutton to show his case has minimal merit. (§ 425.16, subd. (b)(1); *Navellier v. Sletten, supra,* 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 63.)

B. Mr. Hutton's Burden

1. The underlying lawsuit

Ms. Hutton originally sued Mr. Hafif and his firm for legal malpractice on June 29, 1993. Ms. Hutton's legal malpractice action against Mr. Hafif and his firm was dismissed after a demurrer to her second amended complaint was sustained without leave to amend. Sanctions in the sum of $25,000 were imposed against Ms. Hutton and her attorney, Sassoon Sales, for filing a frivolous lawsuit in

bad faith. The judgment of dismissal and the sanctions order were reversed on appeal. Division Two of the Court of Appeal for this appellate district found plaintiff had stated a fiduciary duty breach cause of action. (*Hutton v. Hafif* (Aug. 20, 1997, B088405) [nonpub. opn.].) Ms. Hutton's legal malpractice action was later dismissed for failure to prosecute.

On May 6, 1994, a second lawsuit, *Law Offices of Herbert Hafif v. Killingsworth* (Super Ct. Orange County, 1994, No. 729347), was filed. Mr. Hafif and his firm alleged Ms. Hutton had conspired with others to coerce financial concessions by bringing specious legal malpractice lawsuits and instigating negative publicity. The causes of action asserted against Ms. Hutton in the second amended complaint in the *Killingsworth* lawsuit, filed on October 13, 1994, were for fraud, malicious prosecution, defamation, fiduciary duty breach, privacy invasion, and tortious interference with business relations.

In addition to the fact that Ms. Hutton filed a legal malpractice action against Mr. Hafif and his firm, the principle conspiracy evidence against her consisted of diaries she had kept. The diaries purportedly document Ms. Hutton's contacts with other members of the alleged conspiracy. Orange County Superior Court Judge Leonard Goldstein denied Ms. Hutton's summary judgment motion in the second lawsuit. Judge Goldstein found there were triable issues of material fact as to Ms. Hutton's participation in the alleged conspiracy based on her diaries. Ms. Hutton's subsequent special motion to strike pursuant to section 425.16 was granted. In connection with that motion, Orange County Superior Court Judge Robert E. Thomas ruled that Ms. Hutton's diaries were inadmissible. Division Three of the Court of Appeal for the Fourth

Appellate District affirmed Judge Thomas's order granting the special motion to strike. (*Law Offices of Herbert Hafif v. Soukup* (April 27, 2000, G020977) [nonpub. opn.].) The Court of Appeal held in part: "The only evidence potentially showing merit in Hafif's claims came from Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were inadmissible." (*Id.*, typed opn. at p. 6.)

On November 30, 2000, Ms. Hutton filed a lawsuit alleging the second lawsuit, the *Killingsworth* matter, was maliciously prosecuted against her. The Hafif defendants in this suit were all sued by Ms. Hutton in the November 30, 2000, lawsuit. On July 20, 2001, the defendants filed a special motion to strike Ms. Hutton's malicious prosecution action. The defendants presented evidence that: a former associate had left the Hafif firm, taken clients with him, and then sought to coerce defendants to relinquish claims for fees and costs in connection with those matters; further, numerous frivolous legal malpractice claims by former clients and State Bar of California complaints had been subsequently filed against them, and negative publicity disseminated, in close proximity to each other; there was communication among the alleged conspirators, all former clients or employees of defendants; and a lawyer who represented some of the former clients in their legal malpractice actions subsequently apologized to the defendants. The defendants argued in part that probable cause was established as a matter of law because Judge Goldstein had denied plaintiff's summary judgment motion in the second lawsuit, the *Killingsworth* action. Plaintiff opposed the defendants' section 425.16 motion in this lawsuit. The special motion to strike was denied. On appeal, we reversed the order denying the special motion

to strike and remanded with directions that the defendants recover their attorney fees and costs from Ms. Hutton. (*Hutton v. Hafif* (May 11, 2004, B162572) [nonpub. opn.].)

2. The Special Motion To Strike Should Have Been Granted

The Hafif defendants' special motion to strike argued: Mr. Hutton's intentional emotional distress complaint was legally insufficient; the Hafif defendants established probable cause as a matter of law to pursue the action against Ms. Hutton; and the Hafif defendants acted on the advice of counsel in bringing the *Killingsworth* action against Ms. Hutton. Mr. Hutton's opposition was premised on two declarations filed in response to a special motion to strike filed in a related action, those of Ms. Hutton and Drew Antablin, and a judicial notice request. No declaration was filed by Mr. Hutton. The Hafif defendants' reply argued: Mr. Hutton failed to introduce any evidence of causation and damages; there was no evidence negating the advice of counsel defense; there was no showing of malice; and Mr. Hutton failed to demonstrate the underlying lawsuit, the *Killingsworth* action, was commenced or maintained without probable cause; and there was no evidence the Hafif defendants intended to cause Mr. Hutton to suffer severe emotional distress.

As noted previously, because the section 425.16, subdivision (b)(1) burden shifted to Mr. Hutton, he had the responsibility of demonstrating his intentional severe emotional distress infliction cause of action had minimal merit. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 93; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 63.) We need not address the myriad of flaws

in Mr. Hutton's evidentiary showing in this regard. Suffice to note, Mr. Hutton did not file a declaration. Hence, he has failed to present minimal evidence that: he in fact suffered severe emotional distress; any severe emotional distress was legally caused by the conduct of the Hafif defendants; and he suffered any damage. Therefore, the Hafif defendants' special motion to strike should have been granted. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

IV. DISPOSITION

The November 16 and 27, 2001, orders denying the special motions to strike are reversed. Upon issuance of the remittitur, orders are to issue granting all special motions to strike. Defendants, Wylie A. Aitken, the Law Offices of Wylie A. Aitken, the Law Offices of Herbert Hafif, Herbert Hafif, Cynthia D. Hafif, and Greg K. Hafif, are to recover their costs on appeal and attorney fees from plaintiff, Peggy J. Soukup, subject to the limitation adverted to in the first paragraph of this opinion. Likewise, the Hafif defendants are to recover their costs and attorney fees from plaintiff, Terry Hutton. All attorney fee requests are to be made pursuant to California Rules of Court, rule 870.2(c).

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J. MOSK, J.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.	B154311 (Super. Ct. No. BC247941 Filed 5/27/04 (opn. on remand from Supreme Court)

APPEAL from orders of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Reversed with directions.

Ronald C. Stock, in pro. per., for Defendant and Appellant.

Peggy J. Soukup, in pro. per.; Law Offices of Gary L. Tysch and Gary L. Tysch for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Ronald C. Stock, appeals from an order denying his Code of Civil Procedure[1] section 425.16 special motion to strike. The present lawsuit is for abuse of

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III(C)-(D).

[1] All further statutory references are to the Code of Civil Procedure.

process and malicious prosecution. An underlying lawsuit was dismissed pursuant to section 425.16. Defendant represented the plaintiffs in the underlying lawsuit. This lawsuit followed and defendant filed a special motion to strike. We conclude the special motion to strike in the present lawsuit should have been granted Accordingly, we reverse the order under review.

II. BACKGROUND

Defendant's special motion to strike was directed at the complaint filed by Peggy J. Soukup, plaintiff; alleging abuse of process and malicious prosecution. In an underlying action, Herbert Hafif, Cynthia D. Hafif, Greg K. Hafif (the Hafifs), and the Law Offices of Herbert Hafif (the Hafif firm) sued plaintiff. Defendant was one of the attorneys who represented the Hafifs and the Hafif firm in the underlying action against plaintiff. The underlying lawsuit involved allegations that plaintiff here, Ms. Soukup, a former employee of the Hafif firm, had disclosed to a third party confidential information obtained during her employment. The disclosure was purportedly made in furtherance of a conspiracy to defame the Hafif firm. The underlying lawsuit was dismissed in response to a section 425.16 special motion to strike.

Our colleagues in the Fourth Appellate District, Division Three, affirmed the order granting the special motion to strike. (*Law Offices of Herbert Hafif et al. v. Soukup et al.* (April 27, 2000, G020977) [nonpub. opn.].) In an unpublished opinion, the Court of Appeal held: the trial court erred in considering the plaintiffs' subjective motives for bringing the action, but the error was harmless; the allegedly actionable conduct consisted of Ms. Soukup's

complaints to the Department of Labor, which statements were within the protective purview of section 425.16; and the plaintiffs failed to meet their burden of establishing a probability of succeeding on their claims against Ms. Soukup. *(Ibid.)* The complaint in the present suit alleged that the underlying lawsuit was brought in order to "obtain collateral advantage" so that plaintiff would withdraw a complaint she had made to the United States Department of Labor and not pursue an "ERISA action." Further, it was alleged the underlying lawsuit was brought: to destroy plaintiff's credibility in other disputes; without probable cause; and maliciously.

In response to plaintiff's complaint, defendant filed a special motion to strike. The trial court denied the special motion to strike. The trial court concluded that the special motion to strike procedure did not apply to an attorney representing a party in another lawsuit.

III. DISCUSSION

A. Applicable Legal Principles And Standard of Review

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" *(Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Enacted in 1992, section 425.16, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) The purpose of the statute was set forth in section 425.16, subdivision (a) as follows: "The Legislature finds and

declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ."

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 65; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.) Section 425.16, subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." In order to

protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-1176.)

When a special motion to strike is filed, the trial court must consider two components. First, the court must consider whether the moving defendant has sustained its burden of showing that the lawsuit falls within the purview of section 425.16; i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that plaintiffs cause of action arises out of actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on another point in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1123, fn. 10.)

Second, once the defendant meets this burden, the obligation then shifts to the plaintiff to establish a probability that she or he will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 63; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) The moving defendant has no obligation to demonstrate that the plaintiffs subjective intent was to chill the exercise of constitutional speech or petition rights. *(Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at pp. 62-64.) Nor must a moving defendant show that the action had the effect of chilling free speech or petition rights. *(Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89; *City of*

Cotati v. Cashman (2002) 29 Cal.4th 69, 76.) As to the second step of the special motion to strike decision-making process, the Supreme Court in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, described the trial judge's duties as follows: "[I]f a court ruling on [a special motion to strike] concludes the challenged cause of action arises from protected petitioning, it then 'determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' (*Equilon, supra,* 29 Cal.4th at p. 67 [].) To satisfy this prong, the plaintiff must 'state[] and substantiate [] a legally sufficient claim.' *(Rosenthal v. Great Western Fin. Securities* [(1996)] 14 Cal.4th [394,] 412 [].) 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *(Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [].)" (Fn. omitted.) We conduct independent review of the trial court's decision. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5; *Mission Oaks Ranch, Ltd v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.)

B. The Order Denying The Special Motion To Strike Should Have Been Granted

Plaintiff argues the special motion to strike was correctly denied because the underlying lawsuit did not arise out of an act in furtherance of defendant's petition or free expression rights. (§ 425.16, subd. (b)(1).) We disagree. All of plaintiff's claims arise out of the underlying lawsuit which was dismissed pursuant to section 425.16. Plaintiff

was counsel for the Hafifs and the Hafif firm in the underlying lawsuit. As we will explain, the present action arises out of defendant's exercise of free expression rights on behalf of clients, the Hafifs and the Hafif firm.

No doubt the present lawsuit against the Hafifs and the Hafif firm arises out of the exercise of their petition rights. (*Jarrow Formulas v. LaMarche, supra,* 31 Cal.4th at pp. 734-735; *Navellier v. Sletten, supra*, 29 Cal.4th at p. 95.) The issue as to defendant is slightly different. Rather, defendant was not a party in the underlying lawsuit, he is alleged to have been counsel for the Hafifs and the Hafif firm. In *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152, we discussed the situation where a plaintiff sues *both* the lawyer and client for litigation related conduct in an underlying lawsuit. We recognized that the application of a section 425.16 special motion to strike a complaint naming an attorney and a client may not be the same. We noted: "As to whether Mr. Kass and the Manning law firm, as the lawyers for Financial and Allstate, had standing to bring the special motion to strike, this issue is resolved by the language of section 425.16 subdivision (b)(1) which states in pertinent part: 'A cause of action against a person arising from any act of *that person* in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike. . . .' (Italics added.) As can be noted, the italicized language requires that the defendant . . . be the individual who is or was being sued for exercise of 'that person['s]' right of petition or free expression." (*Shekhter v. Financial Indemnity Co., supra,* 89 Cal.App.4th at p. 152.) In *Shekhter,* we held that the attorney and his law firm were entitled to specially move

to strike pursuant to section 425.16. In *Shekhter,* in addition to representing several clients, insurance companies, in another lawsuit, the attorney and his law firm exercised free expression rights independent of their representation in the underlying litigation. In *Shekhter,* we noted that the cross-complaint alleged tort claims based upon contact by the attorney and the law firm with broadcasting outlets and a "'nationally syndicated journalist.'" (*Id.* at p. 153.) In *Shekhter,* we concluded that the lawyer and his law firm were exercising their *own* free expression rights when communicating with journalists outside of the courtroom. But we did not resolve the question of whether an attorney could secure the benefit of section 425.16 while merely representing a client's interests *in litigation.*

The present case poses the issue we did not conclusively decide in *Shekhter*; whether an attorney may rely upon his or her exercise of free expression rights while providing legal representation in an underlying lawsuit as a basis for a special motion to strike in subsequent litigation. Under the facts of the present case, we conclude that defendant can secure the benefit of the special motion to strike remedy. As in *Shekhter,* our conclusion is premised upon the express language of section 425.16, subdivision (b)(1), which restricts the application of a special motion to strike to a "cause of action *against a person arising from any act of that person in furtherance of the person's* right of . . . *free speech*. . . ." (Italics added.) When defendant, acting as an advocate, filed papers and presented arguments in the underlying litigation, his advocacy activities arose out of the exercise of the right of free expression. The constitutional right of free expression arises in a variety of situations. (*Ward v. Rock Against Racism* (1989) 491 U.S.

781, 790 [music]; *Buckley v. Valeo* (1976) 424 U.S. 1, 14 [political contributions]; *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 932-933 [dancing]; *Spence v. State of Washington* (1974) 418 U.S. 405, 410-411 [placing an anti-war symbol on an American flag].) The Supreme Court has held that the right of free expression arising in the context of litigation "should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (*Pennekamp v. Florida* (1946) 328 U.S. 331, 347.) Further, other First Amendment rights including those of free press and assembly exist in the courtroom, albeit they are qualified. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 578 (lead opinion of Burger, C.J. ["Subject to the traditional time, place, and manner restrictions, [citations] streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, [citation]; a trial courtroom also is a public place where the people generally – and representatives of the media – have a right to be present . . ."]; see *State v. Springer-Ertl* (S.D. 2000) 610 N.W.2d 768, 774 ["public and the press have fewer speech restrictions than lawyers participating in judicial proceedings"].) Finally, the First Amendment applies to lawyers' communications with clients in determining what challenges to raise inside the courtroom. (*Legal Services Corp. v. Velazquez* (2000) 531 U.S. 533, 544, 548 [congressional limitations on issues that may permissibly be raised by legal services lawyers constitutes a "serious and fundamental restriction on advocacy of attorneys" thereby violating the First Amendment].)

We need not decide whether the First Amendment applied to all of defendant's actions as an advocate on behalf of the Hafifs and the Hafif firm. Rather, the question

is whether, in the words of section 425.16, subdivision (b)(1), plaintiffs advocacy actions can be categorized as "arising from any act of that person in furtherance of the person's right of . . . free speech. . . ." As noted in the immediately preceding paragraph, subject to restrictions not necessarily present elsewhere, the right of free expression applies to conduct by a lawyer. A lawyer advocates on behalf of a client and against an adversary. The lawyer advocates orally and in writing. All of the courtroom advocacy involves activities in a public place before a governmental body. As noted previously, section 425.16, subdivision (e) states in pertinent part that the term "'act in furtherance of a person's right of . . . free speech'" includes the following: "(1) any written or oral statement or writing made before a . . . judicial proceeding . . . ; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." The California Supreme Court has construed this language in section 425.16, subdivision (e) as follows, "'[P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 734 citing *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1113.) Defendant's written and oral advocacy on behalf of the

Hafifs and the Hafif firm arose from this form of conduct delineated in *Briggs*.

The foregoing language in *Briggs* is fully supported by the facts in that case. The defendant in *Briggs* was described by the Supreme Court thusly, "Defendant Eden Council for Hope and Opportunity . . . , a nonprofit corporation partly funded by city and county grants, counsels tenants and mediates landlord-tenant disputes." (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1109.) In *Briggs,* the Supreme Court recognize such when it held: "According to plaintiffs, section 425.16 protects only statements or writings that defend the speaker's or writer's own free speech or petition rights or that are otherwise 'vital to allow citizens to make informed decisions within a government office.' Plaintiffs insist tenant counseling activities like [defendant's] are not protected by section 425.16 because they neither promoted [defendant's] own constitutional right of free speech nor informed the public about possible wrongdoing. [¶] Even assuming, for purposes of argument, that plaintiffs accurately have characterized [defendant's] activities as constituting neither self-interested nor general political speech, we cannot conclude such activities thereby necessarily fall outside the protection of the anti-SLAPP statute. Contrary to plaintiffs' implied suggestion, *the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public).*" (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1116, italics original and added.)

We acknowledge that the question directly before the Supreme Court in *Briggs* was whether for purposes of

section 425.16 a statement made before or in connection with an issue under consideration in a legally authorized official proceeding must be one of public significance. (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1109.) The issue here, the availability of the special motion to strike procedure to a lawyer sued for conduct in an underlying lawsuit, is different. But our colleague Presiding Justice Arthur Gilbert has explained the language in *Briggs* set forth in the immediately preceding paragraph requires that section 425.16 be available to a malicious prosecution defendant who acted as counsel in an underlying lawsuit. (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 221.) We are persuaded by Presiding Justice Gilbert's analysis. Further, as we noted in *Shekhter v. Financial Indemnity Co., supra*, 89 Cal.App.4th at page 153, the special motion to strike was available to a lawyer and a law firm representing clients who exercised free speech rights while speaking to journalists. No sound justification exists for limiting the availability of a section 425.16 special motion to strike to a lawyer speaking only outside of the courtroom to a journalist. This is particularly true because the First Amendment, subject to restrictions not present elsewhere, applies to advocacy conduct in and out of a courtroom. Because defendant demonstrated that the claims against him *arose* out of the exercise of his own First Amendment free expression rights, his conduct as an advocate while speaking and writing on behalf of the Hafifs and the Hafif firm, he has sustained his initial burden pursuant to section 425.16, subdivision (b)(1) when the statute is broadly construed. Hence, the burden of proof shifted to plaintiff to show the probability she will prevail on her malicious prosecution and legal malpractice claims.

[Parts II.C-D are deleted from publication. See *post* at p. 12 where publication is to resume.]

C. The Probability of Prevailing

We agree with defendant that plaintiffs brief argumentative and conclusory three-page declaration and the voluminous attached documents filed in opposition to the special motion to strike did not constitute a sufficient prima facie showing of facts to show any potential liability on his part. As to the first cause of action, the mere filing of a lawsuit, something there is no evidence defendant did, does not constitute the tort of abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; *Friedman v. Stadum* (1985) 171 Cal.App.3d 775, 779-780; *Drasin v. Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485; *Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 904-905; *Christensen v. Younger* (1975) 47 Cal.App.3d 613, 617.) Further, there is no evidence of substantial misuse of the litigation process beyond the mere filing of the underlying suit. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra,* 42 Cal.3d at p. 1169; *Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 595.) As to the second cause of action, malicious prosecution, there is no evidence of: malice; an absence of probable cause at any time during the underlying lawsuit; or damage. Hence, there has been no prima facie showing of potential malicious prosecution liability on defendant's part. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at pp. 742-743; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.)

D. Attorney fees

Defendant is entitled to an attorney fee and cost award. (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215.) The attorney fee and cost motion should be pursued pursuant to rule 870.2(b) and (c) of the California Rules of Court. (*American Humane Ass'n v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1104.)

[The balance of the opinion is to be published.]

IV. DISPOSITION

The order denying defendant's special motion to strike under Code of Civil Procedure section 425.16 is reversed. Defendant, Ronald C. Stock, is to recover his costs and attorney fees incurred on appeal and in the trial court from plaintiff, Peggy J. Soukup.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.	B154311 (Super. Ct. No. BC247941) ORDERS MODIFYING OPINION AND DENYING REHEARING PETITION [CHANGE OF JUDGMENT] (Filed 6/21/04)

The opinion filed May 27, 2004, which was partially certified for publication, is modified in the following particulars which will result in a change in the scope of publication and the judgment.

1. The asterisk footnote on page 1 is deleted and replaced with the following: Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III(C).

2. Delete the bracketed language on page 10. In it place insert: [Part III.C is deleted from publication. See *post* at p. 11 where publication is to resume.]

3. Above the heading for part III.D, insert the following: [The balance of the opinion is to be published.]

4. On page 11 under the heading for part III.D, delete the entirety of the body of the opinion. In its place, insert:

Plaintiff argues that defendant is not entitled to an award of attorney fees pursuant to section 425,16, subdivision (c) because he represented himself on appeal and in the trial court. Section 425.16, subdivision (c) states: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." We agree with plaintiff that defendant may not recover attorney fees for the time he spent working on this matter. But if defendant secured legal assistance from another lawyer, plaintiff may be liable for those fees.

Our analysis in this regard largely parallels that used by the California Supreme Court in *Trope v. Katz* (1995) 11 Cal.4th 274, 279-282, a decision holding that a lawyer who represented himself in a lawsuit could not recover his attorney fees pursuant to Civil Code section 1717, subdivision (a). As was principally the case in *Trope,* whether an attorney successfully litigating a special motion to strike in pro se may recover section 425.16, subdivision (c) attorney fees is an issue of statutory interpretation. The pertinent rules of statutory interpretation were specified in *Trope* as follows: "We begin as always 'with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.' (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [].) To discover that intent we first look to the words of the statute, giving them their usual and ordinary meaning. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 []; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [].)

'Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' (*Burden v. Snowden, supra,* 2 Cal.4th 556, 562.)" (*Trope v. Katz, supra,* 11 Cal.4th at p. 280.) Additionally, in *Trope,* the Supreme Court relied on the general rule that when a law contains judicially construed terms, it is presumed the Legislature intended those words to have their established legal meanings. (*Id.* at p. 282; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570.)

In *Trope,* the Supreme Court explained the ordinary meaning of the term "attorney fees" as follows: ". . . Black's Law Dictionary defines the word 'fee' generally as 'A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.' (Black's Law Dict. (6th ed. 1990) p. 614.) It goes on to define the phrase 'attorney fees' as a 'Charge to client for services performed (*e.g.* hourly fee, flat fee, contingency fee).' (*Ibid.*) Similarly, Webster's defines the word 'fee' as 'compensation often in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill.' (Webster's New Internat. Dict., [(3d ed. 1961)] p. 833; see also 5 Oxford English Dict. (2d ed. 1989) p. 797 ['fee' denotes 'a payment,' such as the 'remuneration paid or due to a lawyer, a physician, or (in recent use) any professional man, a director of a public company, etc. for an occasional service'].) Accordingly, the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant

actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Trope v. Katz, supra,* 11 Cal.4th at p. 280.)

Additionally, in *Trope,* the Supreme Court examined its own jurisprudence and that of the Courts of Appeal commencing with *Corriere v. Minturn* (1855) 5 Cal. 435. These decisions consistently held in varying contexts that a lawyer appearing in pro se could not recover attorney fees. In *Trope,* the Supreme Court noted that California courts had refused to award lawyers appearing in pro se their attorney fees in the context of: mortgage agreements (*Patterson v. Donner* (1874) 48 Cal. 369, 380; *Bank of Woodland v. Treadwell* (1880) 55 Cal. 379, 380); inverse condemnation (*City of Long Beach v. Stern* (1929) 206 Cal. 473, 474); and an interpleader action. (*O'Connell v. Zimmerman* (1958) 157 Cal.App.2d 330, 336-337.)

Given in part of the foregoing analysis in *Trope,* the Supreme Court concluded: "These pre-1968 cases are significant for two reasons. First, they support our conclusion that the usual and ordinary meaning of the words 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation. Second, they demonstrate that the words 'attorney's fees' and 'counsel fees,' whether used in a contract or in a statute, had an established legal meaning at the time the Legislature enacted section 1717. In the absence of some indication either on the face of that statute or in its legislative history that the Legislature intended its words to convey something other than their established legal definition, the presumption is almost irresistible that the Legislature intended them to have that meaning. (*Western States Petroleum Assn. v. Superior*

Court[, *supra,*] 9 Cal.4th [at p.] 570; *People v. Weidert* (1985) 39 Cal.3d 836, 845-846 [].)" (*Trope v. Katz, supra,* 11 Cal.4th at p. 282.)

Trope is directly pertinent to the issue of whether a pro se lawyer who is a defendant may recover section 425.16, subdivision (c) attorney fees. *Trope* addressed the state of the law concerning the statutory and contract rights to attorney fees of a pro se litigant who is a lawyer prior to the 1968 adoption of Civil Code section 1717. (Stats. 1968, ch. 266, p. 578, § 1.[2]) The right of a prevailing defendant to section 425.16, subdivision (c) attorney fees was enacted in 1992 when the special motion to strike remedy was first adopted. Nothing of substance changed in terms of a pro se lawyer's right to recover attorney fees between 1968 when Civil Code section 1717 was adopted and 1992 when section 425.16, subdivision (c) was enacted. The logical force of the analysis concerning a pro se attorney's statutory right to recover legal fees in *Trope* applies equally to the present case. Therefore, in 1992, when the Legislature adopted section 425.16, subdivision (c), the usual and ordinary meaning of the term attorney fees

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[2] When originally adopted in 1968, Civil Code section 1717 provided: "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. [¶] Attorney's fees provided by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contact which provides for a waiver of attorney's fees is void. [¶] As used in this section 'prevailing party' means the party in whose final judgment is rendered." (Stats. 1968, ch. 266, p. 578, § 1.)

excluded an pro se litigant who was also a lawyer attempting to recoup legal fees. (*Trope v. Katz, supra,* 11 Cal.4th at p. 280.) Further, commencing in 1855 in *Carriere v. Minturn, supra,* 5 Cal. at page 435, California courts had consistently developed a body of jurisprudence that barred a pro se lawyer from recovering attorney fees. (*Trope v. Katz, supra,* 11 Cal.4th at pp. 280-282.) Under these circumstances, in the absence of an expressed different intent, it is presumed the Legislature intended that the term attorney fees in section 425.16, subdivision (c) be given this meaning as in *Trope.* (*Id.* at p. 282; *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 570.) We have carefully reviewed the committee reports and the Legislative Counsel's Digest prepared in connection with the 1992 adoption of section 425.16, subdivision (c). There is no evidence the Legislature intended to modify the general rule that a pro se litigant who is also a lawyer may not recover attorney fees payable under a statute or a contract.[3]

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[3] The Legislative Counsel's Digest for section 425.16 states in relevant part: "This bill would also provide that a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue, as specified, shall be subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim. This bill would provide that if the court determines that the plaintiff has established a probability that he or she would prevail, neither that determination nor the fact of that determination would be admissible in evidence at any later stage of the case nor would it affect the burden or degree of proof. It would provide for the recovery of attorney's fees and costs by a prevailing defendant on a special motion to strike, and by a prevailing plaintiff if the court finds that the motion was frivolous or solely intended to cause unnecessary delay. The bill would specify that these provisions do not apply to any action brought

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Now, there is a difference between Civil Code section 1717, subdivision (a) and section 425.16, subdivision (c). In *Trope,* the Supreme Court explained that Civil Code section 1717, subdivision (a) right to recover attorney fees applies in a case where they are "incurred."[4] The Supreme

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in the name of the people of the State of California by certain state and local prosecutors, and would require all discovery proceedings to be stayed upon the filing of a notice of this special motion, except as specified. The bill would make legislative findings and declarations." (Legis. Counsel's Dig., Sen. Bill No. 1264, 4 Stats. 1992 (1991-1992 Reg. Sess.) Summary Dig., p. 294.) A Senate Committee on Judiciary report stated: "This bill would also allow a prevailing defendant in any motion to strike such a cause of action to recover his or her attorney fees and costs. . . . [¶] . . . SB 1264 would provide attorney's fees and costs to a prevailing defendant in a motion to strike." (Sen. Com. on Judiciary rep. on Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Feb. 25, 1992, pp. 2, 5.) Other committee reports and analyses contain virtually the same language. (Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 13, 1992, p. 2; Assem. Office of Floor Coordinator 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 26, 1992, p. 1; Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 27; 1992, p. 2; Assem. Office of Floor Coordinator 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) June 29, 1992, p. 1; Assem. Subcom. on the Admin. of Criminal Justice rep. on Sen. Bill No. 1264 (1991-1992 Reg. Sess.) June 30, 1992, p. 2.) No committee reports state that a pro se defendant who is a lawyer may recover attorney fees.

[4] Civil Code section 1717, subdivision (a) provided in 1995 when *Trope* was decided and now: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract. [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the

(Continued on following page)

Court noted: "[B]y its terms [Civil Code] section 1717 applies only to contracts specifically providing that attorney fees 'which are *incurred* to enforce that contract' shall be awarded to one of the parties or to the prevailing party. (Italics added.) To 'incur' a fee, of course, is to 'become liable' for it (Webster's New Internat. Dict. (3d ed. 1961) p. 1146), i.e., to become obligated to *pay* it. It follows that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Trope v. Katz, supra,* 11 Cal.4th at p. 280, orig. italics.) The word "incurred" does not appear in section 425.16, subdivision (c). But the omission of the term "incurred" or a synonym in section 425.16, subdivision (c) does not change our conclusion. The common understanding of the language "attorney fees" plus the consistently developed decisional authority as plainly explicated in *Trope* provide the most logical basis for deducing that the Legislature intended to allow *represented* defendants who special motions to strike are granted to recover their "legal fees" but no one else. (*Id.* at pp. 280-282.) It seems unlikely that if the word "incurred" did not appear in Civil Code section 1717, subdivision (a), the Supreme Court would have reached the conclusion that a pro se attorney could recover her or his contractual attorney fees. Such an unlikely conclusion would have contravened the Supreme Court's determination of the "usual and ordinary meaning of the words 'attorney fees' [ ]" and the pre-Civil Code section 1717, subdivision (a) jurisprudence which denied fees to pro se litigants who

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costs of suit. [¶] Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void."

were lawyers. (*Id.* at pp. 280.) The absence of the word "incurred" in section 425.16, subdivision (c) does not mean the Legislature intended that a pro se litigant such a defendant is entitled to recover his attorney fees.

Further, we recognize that post-*Trope* Court of Appeal decision in other contexts are not entirely consistent. Two decisions by our colleagues in the Division Three of the Fourth Appellate District have held that a pro se litigant who is a lawyer can recover sanctions in the form of attorney fees. (*Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 467-469 [§ 128.7 sanctions]; *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, 268-269 [former § 128.5 sanctions].) Other decisions have held that attorney fees are unavailable to a self-represented attorney in the discovery sanctions context. (*Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1016-1022 [discovery sanction]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1175-1182 [discovery sanction]; see *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 629 [self-represented attorney's right to § 1021.5 private Attorney General fees is doubtful].) We need not address these potential conflicting decisions. We simply rely on the logic expressed in *Trope* concerning what the words "attorney fees" mean.

Our analysis is subject to an exception. If defendant was assisted by another lawyer, attorney fees may still be recoverable. In *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1321-1326, a pro se litigant who was an attorney retained a law firm to assist him during the litigation. We held that the attorney could not recover Civil Code section 1717, subdivision (a) fees for his own work. But we held that the attorney could recover Civil Code section 1717, subdivision (a) contract attorney fees for services provided to him by the law firm. The same

rule applies if defendant received the assistance of another lawyer in the present lawsuit. This issue can be litigated upon issuance of the remittitur as permitted by rule 870.2(c) of the California Rules of Court.

IV. DISPOSITION

The order denying the special motion to strike under Code of Civil Procedure section 425.16 is reversed. Defendant, Ronald C. Stock, is to recover his costs and attorney fees only as specified in the body of this opinion incurred on appeal and in the trial court from plaintiff, Peggy J. Soukup.

5. The rehearing petition is denied.

TURNER, P.J. ARMSTRONG, J. MOSK, J.

PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.

S126864

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 10016; 2004 Daily Journal DAR 12883

October 20, 2004, Filed

JUDGES: George, Chief Justice, Kennard, Baxter, Chin, Brown, Moreno, Associate Justices. Werdegar, J., was absent and did not participate.

OPINION: Petition for review granted.

Werdegar, J., was absent and did not participate.

George, C.J., Kennard, Baxter, Chin, Brown, and Moreno, JJ.

PEGGY J. SOUKUP, Plaintiff and Respondent, v. HERBERT HAFIF, Defendant and Appellant. And Consolidated Case.

S126715

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 10260; 2004 Daily Journal DAR 12883

October 20, 2004, Filed

JUDGES: Werdegar, J., was absent and did not participate. George, C.J., Kennard, Baxter, Chin, Brown, and Moreno, JJ.

OPINION: Petition for review granted.

Werdegar, J., was absent and did not participate. Votes: George, C.J., Kennard, Baxter, Chin, Brown, and Moreno, JJ.

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Case Summary

Supreme Court Case:	S126715
Court of Appeal Case(s):	Second Appellate District, Division Five B152759 (lead) B154184
Case Caption:	SOUKUP v. HAFIF
Case Category:	Review – Civil Appeal
Start Date:	07/23/2004
Case Status:	review granted/brief due
Issues:	Petition for review after the Court of Appeal reversed orders denying special motions to strike. Stock and Hafif include the following issue: Is a cause of action for malicious prosecution subject to a special motion to strike under the anti-SLAPP statute (Code Civ. Proc., sec. 425.16) if the underlying action that allegedly was maliciously prosecuted was itself dismissed pursuant to a special motion to strike under that statute?
Case Citation:	none

Cross Referenced Cases

S109615 SOUKUP v. LAW OFFICES OF HERBERT HAFIF

S111545 SOUKUP v. HAFIF

S126864 SOUKUP v. STOCK

CALIFORNIA APPELLATE COURTS [LOGO]
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Court Case Search Results – Supreme Court
Court data last updated: 11/22/2004 10:53 AM

Case Summary

Supreme Court Case:	S126864
Court of Appeal Case(s):	Second Appellate District, Division Five B154311
Case Caption:	SOUKUP v. STOCK
Case Category:	Review – Civil Appeal
Start Date:	07/30/2004
Case Status:	review granted/brief due
Issues:	Petition for review after the Court of Appeal reversed an order denying a special motion to strike.
Case Citation:	none

Cross Referenced Cases

S109615 SOUKUP v. LAW OFFICES OF HERBERT HAFIF

S111545 SOUKUP v. HAFIF

S126715 SOUKUP v. HAFIF

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

LAW OFFICES OF HERBERT HAFIF et al., Plaintiffs and Appellants, v. PEGGY J. SOUKUP et al., Defendants and Respondents.	G020977 (Super. Ct. No. 729347) OPINION (Filed Apr. 27, 2003)

Appeal from a judgment of the Superior Court of California, County of Orange, Leonard Goldstein and Robert E. Thomas, Judges. Motion for sanctions. Motions to augment the record on appeal. Judgment affirmed. Motion for sanctions denied. Motions to augment granted.

Law Offices of Herbert Hafif, Cynthia D. Hafif and Ronald C. Stock for Plaintiffs and Appellants.

Law Offices of Leibovic & Tysch and Gary L. Tysch for Defendant and Respondent Peggy J. Soukup.

Mark Goldowitz for Defendant and Respondent Terri M. Hutton.

* * *

This appeal follows the granting of motions to strike a complaint pursuant to Code of Civil Procedures section 425.16, the anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. (All further statutory references are to the Code of Civil Procedures unless

otherwise indicated.) Plaintiffs contend the motions were untimely, the trial court erred in finding they were public figures, and in examining the motives for filing the action. They also contend their statements were not made in a public forum, and the publication of newspaper articles did not establish the subject matter is one of public interest. Finding no reversible error, we affirm.

FACTS

Defendant Terrie M. Hutton retained plaintiff Herbert Hafif, a lawyer, and owner of plaintiff, The Law Offices of Herbert Hafif (collectively Hafif), to represent her in a lawsuit against her employer. After the case settled, a dispute arose between Hutton and Hafif over the distribution of the settlement proceeds. As a result, Hutton filed an unsuccessful complaint with the State Bar and then sued Hafif. The trial court dismissed the suit on demurrer, but an appellate court reinstated part of the case. There is no final judgment in that action. The Orange County Register published an article which reported Hafif had been sued by Hutton; the article repeated the allegations in Hutton's complaint to the State Bar.

While employed as a legal assistant by Hafif, defendant Peggy J. Soukup and other Hafif employees were informed that their retirement plan would be terminated and its assets would be distributed to the participants. Soukup left her job and thereafter met with an investigator from the United States Department of Labor to discuss her concerns regarding the administration and proposed distribution of the Hafif retirement plan. Another newspaper article, published the same day as the article mentioning Hutton's dispute with Hafif, described the dispute

between Hafif and the employees concerning the pension plan.

In May 1994, Hafif sued several persons, including Soukup and Hutton. Hafif sought recovery of damages on several theories, including malicious prosecution, defamation, breach of fiduciary duty, interference with business relationships, and invasion of privacy. The complaint alleged the defendants, former employees and clients of the law firm, conspired to commit acts intended to harm Hafif's professional reputation and business interests.

Phillip Benson, another defendant who is not a party to this appeal, filed a demurrer and a motion to strike the complaint. Benson based his motion on both section 425.16 and Civil Code section 1714.10. The trial court sustained the demurrer with leave to amend and treated the motion to strike as moot.

After Hafif filed a first amended complaint, Hutton responded with a demurrer and a motion to strike. The motion cited three grounds for relief: Section 425.16, section 436, and Civil Code section 1714.10. The trial court sustained the demurrer to two causes of action with leave to amend and took the motion to strike off calendar. Benson also demurred to the first amended complaint and moved to strike it on the same grounds as his first motion. Soukup filed a notice joining in Benson's motion to strike. The trial court sustained Benson's demurrer to several causes of action with leave to amend and denied the motion. Hafif filed a second amended complaint on October 13. Soukup again demurred, but this time the trial court overruled it.

Trial of this matter, originally set for May 8, 1995, was continued. The last trial date scheduled was September 3,

1996. On June 20, Hutton filed a special motion to strike the complaint pursuant to section 425.16. Soukup filed a motion seeking the same relief on August 15. After a hearing on August 30, the court granted both motions.

DISCUSSION

The Action Meets the Criteria of the Anti-SLAPP Statute

Hafif makes a series of arguments: The trial court erred by finding plaintiff Herbert Hafif is a public figure; that the actionable statements were made in a public forum; that the mere fact the statements were published in a newspaper made it a public issue; and that the trial court improperly considered plaintiffs' motives in drafting the pleading. No prejudicial error occurred.

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The statute defines the phrase "act is furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. . . . " (§ 425.16, subd. (e).)

Recently, our Supreme Court addressed the question of "whether a defendant who moves under the statute to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, an 'official proceeding' must separately demonstrate that the statement was made in connection with a 'public' issue." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.) In *Briggs*, owners of residential property brought a defamation action against a provider of tenant counseling services. They claimed the provider gave false information to prospective tenants about the owners' alleged bias towards women and minorities and assisted with a potential renter's complaint to the Department of Housing and Urban Development. The Supreme Court held, "a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." (*Id.* at p. 1123, fn. omitted.)

The situation here is similar. Hafif claims the trial court erred by finding that the issue was a public issue. When the actions concern statements made in a legally authorized official proceeding, however, the issue need not be of public significance. Hutton's allegedly actionable conduct consisted of her making complaints to the State Bar. Such statements clearly fall within the actions protected by the statute. Similarly, Soukup's allegedly actionable conduct consisted of her complaints to the Department of Labor. Again, such statements are within the protective purview of the statute. Although the trial court found the statements to be of public significance, under *Briggs* this determination is irrelevant. Assuming

the trial court incorrectly labeled these actions to be of public significance, Hafif was not prejudiced by this finding.

We agree with Hafif's claim the trial court should not have considered plaintiffs' subjective motives for bringing the action. The issue whether an action is covered by the anti-SLAPP statute is a legal one; either the criteria of section 425.16, subdivision (b)(1) are met or they are not, regardless of a plaintiff's subjective intent. However, because we conclude the criteria of the statute were in fact met, the error is harmless.

Plaintiff Failed to Show a Probability of Prevailing

Having determined Hutton and Soukup's claims fall within the purview of the anti-SLAPP statute, we next determine if Hafif met their burden of establishing a probability of succeeding. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 729, overruled on another point in *Briggs v. Eden Council for Hope of Opportunity, supra*, 19 Cal.4th at p. 1123, fn. 10.) We have independently reviewed the record to determine if Hafif made a sufficient showing that they would prevail at trial. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496.)

The basis for the complaint's allegations against Hutton and Soukup was the newspaper articles. The articles accurately reflected that complaints had been made to the State Bar and to the department of Labor and the contents of those complaints. The only evidence potentially showing merit in Hafif's claims came from Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were

inadmissible. Hafif failed to meet their burden of establishing a probability of succeeding in the claims against Hutton and Soukup.

Timeliness of Motions

Hafif argues the motions were untimely because they were heard late in the litigation, indeed just before the last date set for trial, rather than in the early stages of the litigation. The statute does not prohibit a hearing at such a late date. But it does provide, "[t]he special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, *at any later time upon terms it deems proper*." (§ 425.16, subd. (f), emphasis added.) In his order of July 18, 1996, Judge Goldstein stated: "The court, in the exercise of its discretion, permits the same more than 60 days [after] service of the complaint."

There were a variety of reasons the trial court heard the motions when it did. Hutton had moved to strike the complaint shortly after it was filed, but the trial court took the motion off calendar after sustaining both her and Benson's demurrers. Next, the original trial judge had stated his intention to grant Hutton's motion but deferred to another judge to whom the case was to be transferred. The motions were finally granted after the newly assigned judge had an opportunity to review the record. The trial court found that exigent circumstances existed which allowed the defendants to proceed with their motions; Hafif has failed to demonstrate an abuse of the trial court's discretion.

The delays permitted here are not to be encouraged. Late motions under section 425.16 tend to frustrate the statute's purpose which is to encourage participation in

matters of public significance by allowing for the *prompt elimination* of litigation that seeks to punish persons for exercising their rights of petition and free speech. (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672.) The statute was enacted "to provide a procedural remedy to resolve [SLAPP suits] *expeditiously*." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 645 (emphasis added); see also *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817.)

The late filing of the motion combined with the statute's provision entitling the prevailing defendant to receive attorney's fees (§ 425.16, subd. (c)) could prejudice the plaintiff were the trial court to award fees for all services rendered up to the time the late motion was decided. Although at times it may be more efficient to wait until the case is at issue, nothing in the statute encourages the routine filing of anti-SLAPP motions. Therefore, the trial court should invoke the provision of the statute which permits late filing only "upon terms [the court] deems proper" (§ 425.16, subd. (f)) and only award the fees incurred up to the time the motion first should have been heard.

DISPOSITION

The judgment is affirmed. The motions to augment the record are granted. The motion for sanctions is denied. Respondents shall recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

CROSBY, ACTING P.J.

BEDSWORTH, J.

[Names and Address omitted in printing] [SEAL]

California Legislature

Senate Committee
on
Natural Resources and Wildlife

SHEILA JAMES KUEHL
CHAIR

July 27, 2004

California Supreme Court
Ronald Reagan Building
300 So. Spring Street, 2nd Floor
Los Angeles, CA 90013-1233

Re: Hutton v. Hafif, et al.; California Supreme Court Number S125728

I am writing to urge this Court to grant the Petition for Review in Hutton v. Hafif. In *Jarrow Formulas, Inc. v. LaMarche*, this Court found, correctly in my opinion, that a trial court erred when it found that a malicious prosecution cause of action is not subject to scrutiny under the Anti-SLAPP statute (CCP § 425.16), reasoning that the filing of what proves to be a malicious lawsuit could, nonetheless, arguably be an act arising from the right to petition. This Court did not find, however, that all malicious prosecution suits are subject to an Anti-SLAPP motion. The *Jarrow* opinion did not address the case where the malicious prosecution claim is brought to seek redress for a SLAPP suit.

This Court called for an analysis of a malicious prosecution suit to determine the applicability of the Anti-SLAPP statute. It did not, however, conclude that all

malicious prosecution claims are, by their nature, an exercise of the right of petition, such that the defendant never needs to demonstrate that the actions giving rise to the suit, arise from the exercise of a constitutionally protected right of petition. The fatal defect of the Appellate Court that merits review in this case is that the appellate opinion failed to analyze whether or not the underlying lawsuit of the claim for malicious prosecution did, *in fact*, constitute an exercise of the right to petition, such that an Anti-SLAPP motion *may* be appropriate to defeat a claim for malicious prosecution.

The Appellate Court in this case dealt with the first prong of the Anti-SLAPP analysis, whether or not the activity arises from a constitutionally protected right of speech or petition, literally in two sentences. (*See*, Section B under "Discussion".) I respectfully submit that the opinion is fatally lacking in analysis. This Court, if it grants the petition for review, may find that a certain class of malicious prosecutions are not amenable to an Anti-SLAPP motion; not as a categorical exemption, but simply by way of logic. Specifically, this Court may find that a malicious prosecution of an adjudicated SLAPP suit should not be subject to an Anti-SLAPP motion. In other words, that using the Anti-SLAPP statute to protect a SLAPP suit is a logical contradiction. Or, more narrowly, that a SLAPP suit that was, as a matter of law, an illegitimate exercise of the right of petition at its inception, should not receive the benefit of the Anti-SLAPP provisions.

In order to avoid what I believe to be misuse of the Anti-SLAPP statute, I respectfully request that the Court grant review in this case.

Sincerely,

/s/ Sheila Kuehl
Senator Sheila Kuehl
23rd Senate District

[Addresses omitted in printing]

California State Senate

SENATOR
GLORIA ROMERO
TWENTY-FOURTH SENATE DISTRICT

[SEAL]

July 21, 2004

California Supreme Court
Ronald Reagan Building
300 So. Spring Street, 2nd Floor
Los Angeles, CA 90013-1233

RE: Petition for Review Hutton v. Hafif, et al., Case No. 125728

To Whom It May Concern,

I write to urge that this Court grant the Petition for Review in Hutton v. Hafif. The use of the anti-SLAPP statute to protect the filing of a SLAPP suit and as a means of punishing the SLAPP victim is of great concern. This, I believe, is an unambiguous and unsupportable example of abuse of the statute.

Code of Civil Procedure § 425.16 was enacted to discourage those contemplating the filing of SLAPPs. When the legislature enacted section 425.16 and later amended it, the intent was to afford those who were the victims of such practices an additional procedure to quickly dispose of meritless claims arising from the exercise of constitutionally protected conduct. The legislature also intended to provide an additional remedy for victims of SLAPPs, the award of reasonable attorney's fees and costs.

The summary nature of the anti-SLAPP statute presents a great number of concerns, particularly when coupled with the blanket proscription of discovery. In this instance, the statute was used to protect the filing of a lawsuit by a member of the bar against a former client. The allegedly actionable conduct engaged in by the ex-client was reporting the lawyer to the State Bar. However, Business and Professions Code section 6094(a) expressly forbids the filing of a lawsuit predicated on a communication to the State Bar. The use of the anti-SLAPP statute to protect the filing of the lawyer's SLAPP is particularly unfair and unfortunate.

In CCP section 425.17 subd. (b) through (f), the Legislature has, with our support, specifically limited the scope of the anti-SLAPP statute to mitigate abuse. In an effort to further mitigate abuse. Section 425.17 subd. (a) notes the general abuse of the statute and, in counterpoint to section 425.16's direction to construe the statute broadly, advises that the statute should not be used in a manner which would stifle legitimate speech or petition rights.

> "The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16."

That is precisely what has happened in this case and what is happening in many other cases now proceeding through the Courts.

I wish to express, in the strongest terms, my belief that this Court should take this matter up and clearly advise the People of this State and the practicing bar that the anti-SLAPP statute is not to be used to protect those filing SLAPPs. Any other rule would defeat the salutary purposes and intent of the anti-SLAPP law.

Sincerely,

/s/ Gloria Romero
Senator Gloria Romero